APPENDIX A — ORDER OF THE COURT OF APPEALS OF MARYLAND DENYING PETITION FOR REHEARING DATED SEPTEMBER 12, 2002

IN THE
COURT OF APPEALS
OF MARYLAND

Petition Docket No. 291
September Term, 2002

(No. 931, Sept. Term, 2001,
Court of Special Appeals)

KIMBERLY LACEWELL BENNETT

v.

ALLFIRST BANK, formerly known as
THE FIRST NATIONAL BANK OF MARYLAND

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

DATE: September 12, 2002

APPENDIX B — OPINION OF THE COURT OF SPECIAL APPEALS OF MARYLAND DATED AND FILED MAY 29, 2002

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 931

September Term, 2001

KIMBERLY LACEWELL BENNETT

v.

ALLFIRST BANK, formerly known as THE FIRST NATIONAL BANK OF MARYLAND

Eyler, James R., Sonner, Thieme, Raymond G., Jr., (Retired, specially assigned), JJ.

Opinion by Sonner, J.

Filed: **May 29, 2002**

This case arises from a lawsuit filed in the Circuit Court for Prince George's County by Kimberly Lacewell Bennett, Esq., against AllFirst Bank because of the bank's mishandling of a certified check in October 1995.[1] Mrs. Bennett's original complaint alleged causes of action for negligence, wrongful dishonor, breach of contract, tortious breach of contract,

1. AllFirst Bank was known, at the time the events of this case took place, as First National Bank of Maryland.

and defamation. After the close of the discovery period in this case, Mrs. Bennett filed two amended complaints: one alleging racial discrimination, and a second asserting a federal racketeering claim. Upon motions from the bank, the trial court struck both amended complaints, as well as the negligence, tortious breach of contract, and defamation claims. After a trial on the merits of Mrs. Bennett's breach of contract and wrongful dishonor claims, the trial court found that Mrs. Bennett did not suffer any direct damages; however, it did award her $3,000 for emotional harm. On appeal, Mrs. Bennett raises the following issues:

1. Whether the trial court abused its discretion in striking Mrs. Bennett's claim for racial discrimination on the ground that it did not relate back to her original cause of action.

2. Whether the trial court abused its discretion in striking Mrs. Bennett's second amended complaint on the ground it would prejudice the defendant.

3. Whether the trial court erred in denying Mrs. Bennett a jury trial.

We find no error and affirm.

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Factual Background

On October 2, 1995, Mrs. Bennett presented the bank's Inglewood branch with a certified settlement check for $104,819.56. Proper handling of this check required "punching a hole in the MICR line" on the check; however, Krystal Fadely, one of the bank's tellers, failed to punch the requisite hole on the check. Because the hole had not been punched, the check was processed as a noncertified check and was paid out of Mrs. Bennett's account, not out of the bank's certified check suspense account. When the certified check later arrived, the bank debited Mrs. Bennett's account again for the same check.

On October 6, 1995, the bank returned a series of thirty-two checks written on Mrs. Bennett's account as unpaid because there were insufficient funds in her account to cover the checks. After returning from vacation on October 16, 1995, Mrs. Bennett discovered that the checks had been dishonored. Mrs. Bennett went to the Inglewood branch and researched account records to determine what had happened. Dwight Clark, a representative of the bank, eventually discovered that the teller had failed to punch a hole in the certified settlement check.

The next day, October 17, the bank credited Mrs. Bennett's account for the amount of the certified check and agreed to honor all of the returned checks and pay the bank fees associated with them. On November 8, 1995, the bank sent apology letters acknowledging its error to all the payees of the returned checks and others Mrs. Bennett identified.

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Almost three years later, on September 30, 1998, Mrs. Bennett filed her original complaint. On December 6, 2000, she filed an amended complaint, stating a claim for racial discrimination based upon 42 U.S.C. Section 1981.[2] On April 5, 2001, she filed a second amended complaint, asserting a federal claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), pursuant to 18 U.S.C. Section 1961. After a hearing on May 17, 2001, the trial court granted the bank's motion to strike both amended complaints. A trial on the remaining issues commenced on May 21, 2001.

Discussion

I. *The First Amended Complaints*

It is clear that Maryland trial judges have discretion to strike amendments to pleadings. *See, e. g., Crowe v. Houseworth*, 272 Md. 481, 489, 325 A.2d 592 (1974); *First Wholesale Cleaners, Inc. v. Donegal Mut. Ins. Co.*, 143 Md. App. 24, 41, 792 A.2d 325 (2002) (citation omitted). The exercise of that discretion will not be overturned on appeal unless the trial judge abuses that discretion. *Baer v. Baer*, 252 Md. 586, 589-90, 250 A.2d 897 (1969). Trial judges should freely allow amended complaints to serve the ends of justice to ensure that cases are decided upon their merits. *Hall v. Barlow Corp.*, 255 Md. 28, 39-40, 255 A.2d 873 (1969); *Preissman v. Harmatz*, 264 Md. 715, 720, 288 A.2d 180 (1972). Such allowance is not unlimited, however. When a party files an amended complaint alleging a new cause of action, the trial

2. Mrs. Bennett, an African-American attorney, practiced real estate law in Prince George's County.

court may strike it if it does not relate back to the original complaint or does not give the defendant proper notice of the charges it must defend. Here, the trial judge granted the bank's motion to strike the first amended complaint because nothing in the original complaint even hinted at Mrs. Bennett's section 1981 claim, and also because that claim did not relate back to the original complaint.

Of all purposes for pleadings, notice is paramount and a fundamental principle of procedural law. *Scott v. Jenkins*, 345 Md. 21, 28, 690 A.2d 1000 (1997). In the instant case, Mrs. Bennett's original complaint did not allege or suggest racial discrimination. It did not even state that she was a member of a protected class. It did not assert any facts that the bank did or said anything that amounted to discrimination against Mrs. Bennett. Until Mrs. Bennett filed her first amended complaint, two years after she filed her original complaint and over five years since the events occurred, the bank was defending itself against ordinary negligence, breach of contract, and wrongful dishonor charges. Based on these facts, the trial judge correctly found nothing in Mrs. Bennett's original complaint that gave the bank any notice of a potential racial discrimination lawsuit.

The trial judge also struck the first amended complaint because it did not "relate back" to the original complaint. Unlike the federal rule, Maryland's amendment rule does not contain a relation back provision. *See* Md. Rule 2-341 (2001); *Grand-Pierre v. Montgomery County*, 97 Md. App. 170, 174, 627 A.2d 550 (1993). Maryland case law provides, instead, that when an "amendment sets forth a new cause of action, then limitations is measured from the time of the accrual of

the cause to the date the amended [complaint] is filed." *Myers v. Aragona*, 21 Md. App. 45, 51, 318 A.2d 263 (1974)(citation omitted). This principle requires us to determine the amended complaint's "retrospective effect;" that is, whether or not the amended complaint sets forth a new cause of action.

To do that, we look first at the underlying facts actually pled in the original complaint. This analysis strongly supports the bank's position that Mrs. Bennett's claim is not entitled to retrospective effect. For instance, in *Morrell v. Williams*, 279 Md. 497, 506-508, 366 A.2d 1040 (1976), the Court of Appeals held that an amended claim, which required different elements of proof and involved a different measure of damages, set forth a new cause of action that was barred by the statute of limitations. In *Gensler v. Korb Roofers, Inc.*, 37 Md. App. 538, 543, 378 A.2d 180 (1977), this Court held that an amended complaint that asserted a new cause of action was barred by the statute of limitations. These cases clearly indicate that causes of actions based upon the same set of facts, but requiring different elements of proof, constitute distinct and separate causes of actions.

Although Mrs. Bennett's racial discrimination claim concerned the same operative facts as the original complaint, her Section 1981 claim involved vastly different elements of proof and a different measure of damages. To begin with, to succeed on a Section 1981 claim, Mrs. Bennett needed to prove that she suffered intentional racial discrimination. *Chambers v. Omaha Girls Club*, 629 F.Supp. 925, 932 (Ne. 1986), *aff'd*, 834 F.2d 697 (1987). Mrs. Bennett's first amended complaint, therefore, was not a change in the form of the pleading, but, rather, a major change in substance.

Morrell, 279 Md. at 508. Accordingly, we find that the trial court properly exercised its discretion in granting the bank's motion to strike the first amended complaint.

II. *Second Amended Complaint*

Mrs. Bennett's second amended complaint sets forth federal RICO charges. The RICO statute originally was enacted as a tool to help law enforcement eradicate organized crime. *Alexander v. U.S.*, 509 U.S. 544, 561, 113 S.Ct. 2766, 125 L.Ed.2d. 441 (1993). RICO imposes criminal and civil liability on those who engage in criminal enterprises and a pattern of racketeering activity. *See* 18 U.S.C. §§ 1961-1968. To prove that the bank engaged in a pattern of racketeering activity under RICO, Mrs. Bennett must prove that the bank committed at least two acts of racketeering activity within a ten-year period, that the acts were related to the same enterprise, and that the racketeering activity posed a threat of continued criminal activity. *H. J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 232-34, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). RICO is a drastic remedy; it includes criminal penalties and treble damages. *Id.* At 232-33. For that reason, those making such charges have a much greater burden of proof than those seeking redress for a negligent handling of a depository account.

At the hearing on the motion to strike this amendment, the bank made the same arguments that it did in opposing the first amended complaint. The bank argued that the statute of limitations on RICO cases was three years, and that Mrs. Bennett filed her amended complaint five-and-one-half years after the relevant events occurred. The trial court,

however, struck Mrs. Bennett's second amended complaint, because it found that it would have been prejudicial to the bank to require it to prepare a defense to the RICO charges when the trial was scheduled for the following week. The court indicated it was reaching this decision on the prejudice issue, "aside from the Statute of Limitations."

We find that the trial court correctly struck the second amended complaint for either of these reasons. The second amended complaint was filed long after the close of discovery and one week before trial. There had been no discovery on the RICO issues. It would have been prejudicial to the bank to require it to defend itself against RICO charges brought only one week before trial.

To the extent that the trial court also relied on the fact that the second amended complaint was filed outside the statute of limitations, the trial court was again properly exercising its discretion. As noted above, an amended complaint that asserts a new cause of action is not entitled to retrospective effect. Here, Mrs. Bennett's RICO charges involved substantially different elements of proof and carried a more severe measure of damages. The trial court properly found that this amended complaint was barred by the statute of limitations.

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III. *Jury Trial Reauest*

Mrs. Bennett alleges that the trial court erred in denying her a jury trial, pursuant to the Seventh Amendment of the U.S. Constitution. The U.S. Supreme Court, however, has consistently held that the Seventh Amendment was not incorporated into the Fourteenth Amendment, and, consequently, is not applicable to the states. *See Bringe v. Collins*, 274 Md. 338, 341-42, 335 A.2d 670 (1975) (citations omitted). In Maryland, Mrs. Bennett's right to a jury trial is protected by Article 23 of the Maryland Declaration of Rights. That right, however, is subject to reasonable restrictions. *See Houston v. Lloyd's Consumer Acceptance Corp.*, 241 Md. 10, 14, 215 A.2d 192 (1965) (holding that right to jury trial not violated by requiring a timely written election).

Maryland Rule 2-325 (a) provides:

> Any party may elect a trial by jury of any issue triable of right by a jury by filing a demand therefor in writing either as a separate paper or separately titled at the conclusion of a pleading and immediately preceding any required certificate of service.

Here, Mrs. Bennett did not request a jury trial in the complaint; instead, she claims that she satisfied the rule by checking the jury trial box on a civil information report. We find that method of requesting a jury trial to be insufficient and not in compliance with the rule. As the bank points out, Ms. Bennett is a licensed attorney in this State, and she was represented by counsel when the complaint was filed.

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The proper way to request a jury trial is outlined in Rule 2-325, and knowledge of the procedure is attributable to both the plaintiff and her attorney. Ms. Bennett's failure properly to request a jury trial led the trial court and the bank to expect a bench trial. The court properly denied the tardy request.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

APPENDIX C — REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS (TRIAL) DATED MAY 21, 2001

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

Civil Action Trial No. 98-20587

KIMBERLY LACEWELL BENNETT,

Plaintiff

v.

FIRST NATIONAL BANK OF MARYLAND,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF
PROCEEDINGS
(TRIAL)
(Volume I of I)

Upper Marlboro, Maryland
May 27, 2001

BEFORE:

HONORABLE JAMES J. LOMBARDI

* * *

[167] under deceptive trade practices acts.

THE COURT: We do not have that here, —

MR. TRACY: Well, I —

THE COURT: — so I do not see any deception. I do not seen any intentional fraud or anything of the nature. All we have is this, the remedies for dishonor —

MR. TRACY: Right.

THE COURT: — of breach, which allows actual damages. There is none. Plus consequential damages. So does this not come down to whether or not these are reasonably foreseeable consequential damages, and whether there is a causal connection?

MR. TRACY: I do believe that is a correct analysis, Your Honor. And I think that the *Dobbins*, the *Dobbs* case provides a road map. And so does *Hannah*. *Hannah* was an intentional tort. *Dobbs* makes the distinction, and so does *Hannah*, between intentional torts and negligence.

THE COURT: Your answer is, no. You do not think?

MR. TRACY: Well I think your analysis is correct. But applied to these facts, I do not think with any proximate, any proof of proximate cause. I do think —

THE COURT: Well, you have the temporal element. All this happened quickly after she found out about it, —

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MR. TRACY: Well I think that the problem —

THE COURT: for the most part. I mean I know

* * *

[178] cancer. The objective manifestations that the court allowed, or the court ruled could show emotional distress where fatigue, sleeplessness, constipation and mood change, which mood change would be what was described in terms of plaintiff's buoyant, buoyant, buoyancy about her business and the vacation. And the Court specifically held that in this case these things could be found by the fact finder without expert testimony. So that in terms of —

THE COURT: Including loss of weight and no sleeping.

MR. PRESSMAN: And, okay

THE COURT: I read the case.

MR. PRESSMAN: Right.

TIDE COURT: Yes, I have it.

MR. PRESSMAN: Right. So I think in terms of —

THE COURT: I agree with you.

MR. PRESSMAN: In terms of Maryland law this, this, okay. Thank you.

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THE COURT: In this case the bank made a mistake by failing apparently to punch a hole in a check which would have identified it as a certified check. This check was presented to the bank by plaintiff, Kimberly Bennett. It was in the amount of $104,819.56. And it was debited to her account twice, which caused severe overdrafts in her escrow account.

[179] The plaintiff had a thriving settlement business as a title agent. Had a number of clients. And on this particular occasion after conducting one of her settlements, and depositing a certified check, and writing checks out of her account on that certified check, on the strength that the certified check would be deposited into her account, wrote checks do her escrow account in the sum of thirty-one of them. Seemed to have been dishonored. Understandably the people to whom those checks were written were very upset.

As it turned out the plaintiff went away for a vacation. And between the time she wrote the checks and the time she came back, all hell broke loose on these people who, whose checks had bounced. And indeed this was sort of a hell for the plaintiff.

She was very upset when she came back and learned that. Thought it was her fault. And spent a good deal of time trying to discover the reason this happened. Went to the bank where she had been dealing for some time. And on October the 16th spent approximately seven hours looking for the mistake.

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In the time she was at the bank Mr. Dwight Clarke who was, I think he was the manager at the time, I am not sure. In any event Mr. Dwight Clarke was trying to help her discover what the problem was, and apparently through some [180] phone calls learned later in the day what had happened, and told her so. Told her that one of the tellers forgot to put a hole in the check. It was certified.

The bank admitted its mistake, and between that time and the very next day corrected its mistake. And then spent the next few weeks trying to make amends with the plaintiff's recipients of the dishonored checks. And indeed with her help and their lawyer's help, the bank sent out letters to all of its, all of the plaintiff's customers explaining that the mistake was the bank's and had nothing to do with Ms. Bennett. And they apologized for their error.

As a result there was no loss of business that has been claimed in this case through this error. And indeed there is no evidence that the plaintiff suffered any actual damages as a result of the bank's error.

What this case comes down to is the emotional state of Ms. Bennett from October the 16th, when she learned that these checks had bounced, and when she learned the reason that the checks were dishonored.

We know that she went home that day, October the 16th, and she was very, very distraught. Her husband testified to that. Said she was ashen. She cried. She was very distraught. Different than he had ever seen her before. She went into her room. She said cried for two and [181] a half hours. So we

know on that day Ms. Bennett suffered emotional distress, and the Court finds that that was directly related to the dishonoring of checks sent to some of her clients.

I would think that the bank would be responsible for that. They had to have foreseen that something like that might happen. They knew that Ms. Bennett had a large escrow account there, and that would be a reasonable consequence of its mistake.

And we know that for the next month until at least these letters went out by the bank that Ms. Bennett for that month was very worried about her position with her clients. She had trouble sleeping. She sweated profusely. Lost weight. And she was mighty angry. I would think that that too was a consequence of the bank's mistake.

However, on November the 17th when those letters went out, wait a minute. Forget that. That is Exhibit 5.

MR. TRACY: It was November 8, Your Honor.

MS. MILLER: November —

THE COURT: What? What? November.

MS. MILLER: — the 8th.

THE COURT: I am sorry.

MS. MILLER: November the 8th.

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THE COURT: November the 8th —

MR. TRACY: November 8, yes.

[182] THE COURT: — when the letters went out, it seemed to me the bank did all that it could have done to rectify the situation. And at that point Ms. Barrett, Bennett, I am sorry, should have gotten over her anger and her problems. So as, although I think she was in hell for a while, I think it is, to use the analogy from Danté, it was the first circle of hell. Not the ninth.

VERDICT OF THE COURT

Accordingly the Court enters judgment in the favor of Ms. Bennett in the following way. For the first day when she found out about this incident, went home and cried for several hours, I will award $500.00. For the first month until November the 8th when the bank letter went out, $2,000.00. For the second month until she could and should have gotten over it, another $500.00, for a total amount of $3,000.00, plus Court costs.

Anything else, gentlemen?

MR. TRACY: No, Your Honor.

THE COURT: Now I want you to take your Exhibits back, and I certainly want you to take all these Exhibits back. I thank you for giving me the depositions, but you all can have these back. Return the Exhibits Madam Clerk, and enter the appropriate judgment.

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THE CLERK: Do you want (inaudible).

THE COURT: The case is closed statistically, exactly.

MR. TRACY: May we be excused, Your Honor?.

THE COURT: Indeed.

MR. TRACY: Thank you, Your Honor.

(The proceedings concluded at 3:23 p.m.)

APPENDIX D — REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS (MOTIONS HEARING) DATED MAY 17, 2001 AND FILED AUGUST 2, 2001

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

CIVIL ACTION LAW
No. 98-20583

KIMBERLY LACEWELL BENNETT,

Plaintiff,

vs.

FIRST NATIONAL BANK OF MARYLAND,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF
PROCEEDINGS
(MOTIONS HEARING)

Upper Marlboro, Maryland
May 17, 2001

BEFORE: HONORABLE LARNZELL MARTIN, JR.,
Associate Judge

[commencing at p. M-15] That check that came back and hit my bank. In the second order of presentment it paid $104,756. And, there-fore, when the thirty-two checks were presented and thirty-one were uncollected there was a balance of $65,555.08.

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Per UCC Rules they should have returned one check and paid thirty checks, with a residual balance of $20,241.01. The bank returned all thirty-two checks from my escrow account.

Their pleadings were done the month that they changed their commercial overdraft system to be compliant with the UCC provisions of the final payment.

Their retail side was already compliant with making UCC paid items irreversible. The commercial side was totally non-compliant.

Therefore, when the Defendant's checks were presented to the bank they said that it caused the checks to bounce because of a double withdrawal from that account.

That is the banks fault. That is obtaining money in the custody of a federally-insured institution by false pretenses, and the overdrafts were returned because of their false pretenses and improper certification. It was the UCC Paid items on [M-16] their commercial overdraft system. Which then the upper echelon of the bank had to give approval for any overturns.

The bank changed that the same month I initiated this, which was almost three years up to the Statue of Limitations. Therefore, when they filed their pleadings they knew that the check did not bounce due to an improperly certified check, it was due to the fact that they had a systematic non-compliance with the law of the UCC. It is in violation of regulations of the UCC — their in-house manual and the rules of UCC. That is what this is about.

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In June of 1999 I requested production of documents that discloses duality of the system, the retail versus the commercial. The retail being UCC compliant, non-reversible, must pay items. This was requested June of 1999.

The Court compelled them on October 20 of 2000 to produce the documents. They did not produce them. I had to go back to court on January 10 of 2001, a few months ago, on this very issue.

The Court then ordered them again to produce the documents. They produced them after I spent days of going through the documents, putting [M-17] them back in order. They did partial productions of that.

They revealed that the retail side was compliant and being unreversible. And their understanding of the UCC Rule is that checks are paid based on the total amount of over-drafts submitted for the day, not based on a per-check basis for the UCC.

Further, Section 4-402 states that they can only dishonor checks based on the balance that is in a customer's account. There is an upper echelon, also, that can make decisions to overturn the system.

The bank had a different system for commercial account customers. How long they knew me determined whether they were going to pay the checks, to make the commercial analysis to determine whether they were going to pay my checks.

The determining factor was not how much they had in my account, therefore, they committed bank fraud.

$104,000 was taken out of my account for fourteen days. The sum $65,000 was taken for fourteen days and they bounced thirty-two checks. There is three funds of money that they have not accounted for.

They sent letters from general counsel for the bank, sitting at the table with the Defendant, to [M-18] my clients that had received the checks that the checks bounced based on an improper certification.

Meantime, one of the individuals who participated returned the check as uncollected. Uncollected means the funds are in her account, they are just not cleared. That was violative of UCC's Rules on Financial Transactions.

That individual was fired the month after I initiated this litigation. All of her securities licenses — 6, 7, 24, and 63 — were no longer active. They never became active again and have since expired.

That is all, Your Honor.

THE COURT: One question in reference to the RICO claim in December of '99. When your Counsel, Ms. Ellis — When your counsel sought to withdraw her appearance there was reference to RICO. How long has it been that this claim had been considered as one that would be presented?

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MS. BENNETT: Sir, back in December of 1999 I was going on my emotional condition, my emotional state, of what happened to me, feeling that RICO was applicable in that a bank could bounce thirty-two checks on my escrow account.

At that time I did not realize that they had violated the UCC Code by not paying the checks. I [M-19] did not realize that under final payment their dishonoring a total of $114,000, when I had $65,000 in my account, was RICO, was the bank's fault.

Even Judge Smith said to me the last time that we met, he said, Ms. Bennett, it seems to me that if you think they are hiding something — and they very well may be hiding something — but that is for you and the trier of fact.

Basically, that is the facts. That is what they said. The check bounced because of the improper certification, of an improperly certified check. That is a fact that they don't deny. That is all the facts they are able to prove. And, in the phrase of Walt Garrison, they wouldn't be able to stray off the ranch.

It wasn't until their production of documents that it was shown that they had to implement a duality system for the UCC. Final payment under the UCC retail side was compliant, making UCC paid items irreversible, non-reversible. On the commercial side it was totally different.

Not only that, Your Honor, there was a variety of irregularities with my account. They were attempting to change the type of product that I had originally opened, by the same individuals who [M-20] perpetrated this upon me, as well as removing funds for bounced checks.

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For five years they are refusing to put them back, even when I wrote them and said the funds that you have removed in bounced checks fees that you promised to bring back are part of client funds that now I am forced to pay out of my pocket.

So it relates to a variety of irregularities. The UCC states that in good faith the honesty. And, in fact, it is also reasonable commercial standard, a fair deal.

The fact that the checks bounced was based on improper certification. They said that. And it was after they had already changed their commercial system to become compliant once I filed.

So they knew it was based on the fact that they had overturned UCC, and not had the effects of any improper research like that. And general counsel sent letters to my client through the mail stating that these checks bounced based on the effect of an improper certification.

THE COURT: Thank you.

MR.. TRACY: May I respond, Your Honor?

THE COURT: Yes, sir.

MR. TRACY: First, Your Honor referenced [M-21] withdrawal developed the case. And I am not sure where the referral to the RICO claim. Is that in the court file? Because the Plaintiff, for approximately six months, has suggested

and threatened an administrative proceedings against the bank. No such administrative proceeding has been forthcoming.

So it would suggest to me that she has tried to get Ms. Ellis to bring RICO. But, again, she brought this Amended Complaint on the eve of trial. We had no way of knowing she was going to do this.

She would never disclose to me what the basis was of the administrative proceeding because she keeps everything close. She doesn't file papers in opposition, she won't speak with me, and she doesn't correspond on issues related to the case.

THE COURT: Let me just say this.

Paragraph —

I know I am interfering with your inquiry.

MR. TRACY: Yes.

THE COURT: Motion to Withdraw Appearance of Counsel filed December 29, 1999, Paragraph 3: Furthermore, Plaintiff was insistent upon Counsel filing a racketeering claim against Defendant in this matter, which the undersigned believed was inappropriate. On this basis, as well as the [M-22] undersigned section to withdrawn, was December 29, 1999. That is reference to rebuttal.

MR. TRACY: Thank you, Your Honor. I had forgotten that. I am sure I read it at that time, certainly, in Counsel's Motion to Withdraw.

Furthermore, when Counsel, herself, is saying it is not warranted by the facts is certainly not a notice of the claim.

Even if the Court would consider that notice, that is still four years after these events occurred. Four years and two months.

What is important here, Your Honor, listening to the Plaintiff argue, is like trying to avoid scattershot from a gun.

Change of accounts. There was an account that the Plaintiff had, an operating account, not this account at issue. The bank improperly designated it as Commercial 1 or Commercial 2, or something of that nature.

The Plaintiff said that there is a problem here. The bank fixes it back in April or May of 1995, well more than three years before the Complaint was filed. That is not even in issue in this case. It is not even the same count that was ever filed be followed between the parties.

[M-23] Plaintiff refers to accounting for funds. The suggestion here that some funds are missing, and haven't been accounted for, I think is incredibly untrue. And it is incredibly disingenuous. The Plaintiff had $104,000 in debits from her account. It was improperly debited the second time.

When the mistake was discovered the bank put it right back in immediately. No question about it. There are know funds missing, no funds that are unaccounted for.

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The Plaintiff suggests that the change of manuals is an admission of how, the bank had knowledge that the systems were noncompliant. The change of manuals is something that took a long period of time. It went from a five-volume manual down to a two-volume manual. It was part of implementing the UCC Rules.

The First Maryland Bank had acquired out of it was state aimed it went with out-of-state banks and they had a new computer system.

Once the Plaintiff filed the Complaint they didn't put it in a new context. The bank never asked any witnesses about any issues. She is simply taking facts that are plotting out there and adding that to her theory. The firing of Amelia Holland. Amelia Holland was fired for a purpose completely [M-24] unrelated to the Plaintiff, or her case.

Ms. Holland had a securities licenses, and so did other people. In the Plaintiff's facts she suggests it is relevant. I don't know why.

Mail fraud. She accuses Nancy Miller of committing mail fraud, of sending letters of apology to her clients. Letters that she wasn't happy with, although it contained the language suggested by the client.

After mail fraud there is bank fraud.

THE COURT: She is accusing the bank of bank fraud?

MR. TRACY: That is what I heard. There is no suggestion of any representation in her statement, or anything to the Plaintiff, that was fraudulent, unreasonable, a misapplication of these facts.

These facts haven't been plead. They haven't been asked about in discovery. They haven't been explored. They should be stricken.

Your Honor, the issue about these dual systems. The Plaintiff somehow suggests that it is — that this is relevant. The Plaintiff herself said, I didn't know about UCC requirements until some years after I filed the Complaint. That is not the bank's [M-25] problem that she didn't know that.

Maybe the bank violated another provision of the UCC. Liability is admitted. It has been admitted. The bank violated 4-402 by wrongfully dishonoring thirty-two checks.

The Plaintiff has now come up with a theory that it shouldn't have returned thirty-one of those thirty-two checks based on a different section of the Code.

Well, Plaintiff alleged 4-402 in her Complaint, not another Section. If there is another section the bank violated, it was incumbent upon her to file that claim within the Statue of Limitations period.

The manual is a red herring. The manual had a retail side, which the Plaintiff asked questions about. I wrote Plaintiff's new counsel a letter and said that doesn't apply to this case. Here is the commercial section of the manual.

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Now, the Plaintiff said the manual didn't comply with the UCC. Well, right or wrong, the UCC imposed a duty upon the bank. That duty existed back in 1995, and Plaintiff's claim had to be filed with the UCC provision within three years. The only relevant facts here, which do not establish retail in [M-26] any way, the facts are miscertified checks.

Thirty-two checks were returned. Their amounts, in relation to the balance in Plaintiff's account on October 6, 1995. All of these facts were known to all parties on October 16, 1995. At that point the Statue of Limitations began to run. And there is no other relevant fact that has been produced in discovery that has any bearing on this.

The Plaintiff — Again the Plaintiff's suggestion here about the production of documents, the bank responded to the Request for Production of Documents. We got no letter or phone call saying that these are deficient until she filed a motion a year later.

And the delays are the Plaintiff's fault. Plaintiff filed the Motion. The bank voluntarily produced the required documents.

And then we go to a hearing and the Plaintiff says: I need the full manual. Well, only about ten pages of the manual are relevant to this case, which has already been produced.

The Plaintiff is playing her theories. Judge Smith said, you produce the manual. So we produced it.

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We go back to court on January 10. And it [M-27] is held, again, to an absolutely untrue statement.

After the October 20 hearing the judge said, please sign a confidentiality order. We get to respond.

We filed a motion heard by Judge Smith. Our motion to grant this. And we are not responsible.

There is no bad faith going on here by the bank. The bank is following the Rules of Procedure, in attempting, the best it can do to communicate with the Plaintiff and resolve the issued in court. It has not been possible.

But all of this is not relevant. What is relevant is meetings, notice of pleas, and the Statute of Limitations. And there can be no question that the phrase withstands. The Plaintiff had something. She produced the evidence. It is about damages.

The Plaintiff does not have to prove damages. She did not have a right after discovery closed to add ten counts to the case that alleges different types of facts unrelated to what the case is about, and which adds a series of categories of damages that the bank was not defending for two years in this case. And that is what is before the Court is the issue of the Statute of Limitations.

For that reason, Your Honor, the Defendant [M-28] respectfully will request that the (Second) Amended Claim be stricken.

And I have further argument about the Third Amended Claim, which I'll address when Your Honor is ready.

THE COURT: In reference to the Defendant's Motion to Strike the (Second) Amended Complaint, the Court finds that it would be prejudicial to the Defendant to require that the Defendant prepare a defense of the new causes of action set forth in the (Second) Amended Complaint. And that is aside from the Statue of Limitations.

The trial being set for next week, the Court finds it would clearly be prejudicial to the Defendant to allow the Plaintiff's (Second) Amended Complaint to go forward. And the Defendant's Motion to Strike the (Second) Amended Complaint is granted.

Now, anything additional in reference to the Motion to Strike the Amended Complaint?

Mr. Tracy, do you have anything?

The Court has a copy of the hearings transcript, page 60 of the hearing before Judge Smith.

MR. TRACY: Your Honor, are you referring to the Plaintiff's Motion to Strike Bond, the April 24 hearing?

[M-29] THE COURT: You can go ahead and proceed with your argument.

MR. TRACY: Because I have a copy.

THE COURT: I'd like to see it, if I can.

MR. TRACY: This is the Motion to Strike with attachments.

(Whereupon, the documents were passed to the Court.)

THE COURT: Thank you.

You may continue.

MR. TRACY: Thank you, Your Honor.

He made reference —

THE COURT: You made reference in your correspondence to Judge Smith to a page 60 reference to your Motion to Strike the Amended Complaint.

Let me just return this one to you. This is —

MR. TRACY: With that referencing, Judge Smith, —

THE COURT: One second here.

MR. TRACY: Sure.

Actually, I have a copy of that prior hearing.

THE COURT: In your May 1, 2000, letter to the judge it states: See attached a copy of the [M-30] relevant portion of the transcript of the hearing, specifically page 60, for your reference.

MR. TRACY: And Judge Smith denied the motion without prejudice, to be heard by the trial court.

THE COURT: And the first question is —

Well, continue.

MR. TRACY: Well, just to trace the procedural aspect that occurred. The Plaintiff filed this Motion on or about September 6. The Defendant duly filed a Motion to Strike. No Opposition was filed, or has been filed.

On the January 10 hearing, which was a hearing on Defendant's Motion for Confidentiality Order, in the pretrial conference I had raised the issue of the unopposed Motion to Strike. That was the standard.

Judge Smith declined to hear the merits of the motion. He said it was better heard by the trial judge. Which, of course, is indicated on page 60, where he denied the motion without prejudice.

Thereafter, I intended to file a motion with the Court requesting that a hearing be held before trial so that the parties know what the Plaintiff is going to present at trial so they may [M-31] prepare.

The Court scheduled a hearing on May 4. That was before the Court when they scheduled the hearing on May 4.

On May 2 the Plaintiff delivered a letter to Judge Schiff's chambers requesting the matter be continued because of Judge Smith's comments on page 60.

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The fact was I didn't have any notice of the request for this hearing. I appeared on May 4 before Judge Lombardi, after Judge Schiff went to the hospital. Judge Lombardi refused to hear the motion in the absence of Judge Schiff.

I sent a letter to Judge Schiff requesting that there be a hearing scheduled. And I also sent a letter to Your Honor with the same.

Now, the issues, the legal issues, are the same on both the First Amended Complaint and the (Second) Amended Complaint.

The First Amended Complaint has one factor on 242 UCC, Section 81. The First Amended Complaint requests a jury trial. The Plaintiff had previously waived that right in the Complaint by not requesting a jury trial.

Now, what is important here is the same [M-32] principal. This is an unopposed motion. It is a Opposition to Motion for Summary Judgment.

I prepared a memo for the Court outlining all of the relevant cases — cases with my cites, cases with the Plaintiff's cites, and some additional cases that allow amendments. And in all of these cases — our cases and the Plaintiff's — support the Defendant's conclusion here that they cannot do that.

The Plaintiff used general ideas about operative facts. What are the operative facts? Who handled the check? Breach of contract with the Defendant. UCC tort. The Plaintiff got the wrong facts. Those are the operative facts.

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The Plaintiff said, I am now alleging race discrimination. And it all happened back then when they mishandled the check. So it relates back.

That is not the law in Maryland and shouldn't be the law in Maryland.

What goes back to the pleadings is a very simple standard to meet, which the Plaintiff failed to meet. The standard is Complaints that do not allege or suggest racial discrimination. It doesn't even state that the Plaintiff is a member of a protected class. It doesn't say anything about any facts that anybody at the bank took any action or said anything [M-33] to discriminate against the Plaintiff because of her race.

The Defendant filed Interrogatories, Answers to Interrogatories. And she was making no reference to this claim for racial discrimination. That was in 1999.

On February 2 of 2000, almost a year and a half into this case, over five years since the events occurred, the Plaintiff said under 5-738, asking her questions at length about what happened. Who were these people? Who said what? Why do you think they did this or didn't do this or that?

There were depositions. Not one mention of racial prejudice. Not one suggestion that I was the victim of discrimination. Probably because she liked everybody at the bank except for one person. But she liked everybody. They were all African-Americans. That is what her position was.

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We are not defending a civil rights case here, at least for the first two years of it. Suddenly, in the Amended Complaint, there is a racial discrimination claim.

Now, the law, — If Your Honor refers to the cases outlined by the Plaintiff, it is very clear, to relate back the initial pleading, it has to set [M-34] forth facts that give notice of the claim that the claim she is asserting should relate back.

For example, the case that the Plaintiff relies upon is a case where the Plaintiff had sued the Defendant for tortious interference of contract. They alleged the contract — They alleged that the Defendant breached the contract. They alleged that they were damaged as a result of that breach.

Unfortunately, they stated in the initial Complaint this is a tortious interference case, not with the contract or the Statute of Limitations. Period. They state, well, it is a breach of contract case.

The Court said that relates back, that you plead all of the operative facts that are set forth in this cause of action.

In the new Complaint the new cause of action was setting forth all of the operative facts back in the original Complaint. That is the most recent case on the theory of liberal allowance of cause. That is the most liberal case the Plaintiff could find. In that case all the facts were plead in the Complaint.

There can be no dispute that this initial Complaint mentioned nothing about racial [M-35] discrimination, and provides absolutely no notice that the Plaintiff has this claim.

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Now, if you review the other cases, the other cases plead by the Defendant and the Plaintiff. The Plaintiff's case, which is cited in support of her position, is Cline versus Fountain-rock Lime and Brick Co.

In that case the court held that the new cause of action based upon the alleged joint venture agreement was a distinct cause of action from that based upon the alleged joint venture agreement was a distinct cause of action, with different elements — with different elements accrued.

In Morrell v. Williams, a wrongful death case, the court held that wrongful deaths filed within the Statue of Limitations — outside the Statute of Limitations, and they used the language, clearly in a wrongful death case mental anguish requires different elements of proof and involves a different measure of damages.

A person may suffer mental anguish. But the Court held a claim for mental anguish is a totally different cause of action and requires different elements of proof, different facts in discovery, and a different measure of discovery which cannot follow [M-36] after the close of discovery in a case.

In Gensler versus Korb Roofers, Inc., Gensler put the roof on. There is a hole in it. Gensler initially filed the case under breach of Warranty within the Statute of Limitations, adding a claim of negligence outside the limitations.

That is not going back. Clearly it is the same set of operative facts, if we are talking about a leaky roof.

But what is crucial is whether or not the elements of the cause of action were plead in the initial pleading. Negligence at different elements of proof and different measures of damages not plead in the initial Complaint does not relate back.

There can be no question in this case the Plaintiff did not plea racial discrimination. We are not even talking about a case plead days before the Statute. That was a rush job. And in discovery she starts raising racial discrimination. We should have known this. We should have known that.

That is not what this case is about. The Plaintiff states in deposition the case was prepared, and she decides to wait until the Statue of Limitations almost ran, and then she filed it. There is no issue for deliberation.

[M-37] And since that occurred, surely the Plaintiff would have raised an issue in the Answers to Interrogatories, or at least in her deposition in this matter. The Defendant has repeatedly asked: What are your damages? So we can make settlement or dispute them you have to state your damages.

But, apparently, the Plaintiff was unable to produce such evidence. She is trying to place this case before a jury to discover damages. And we are back to the same issue as we were on the (Second) Amended Complaint about the Statue of Limitations, about notice.

It is also about prejudice. Because in this case the Amended Complaint was filed after the close of discovery. The Defendant

has not had any opportunity to depose the Plaintiff for challenge of pleadings before Judge Smith, or motions after discovery.

We have had no discovery on these issues. The Plaintiff herself, in the deposition, never asked one question about racial discrimination. And it can't be clearer that there is no legitimate cause of action.

But, regardless, if there was — We are talking about the Statute of Limitations, and the [M-38] cause of action cannot be affected. For that reason there is a whole new cause of action, and the Amended Complaint should be stricken under Rule 2-341.

THE COURT: Mr. Preston?

MR. PRESSMAN: Your Honor, about two and a half weeks ago the Defendant filed a Motion for Partial Summary Judgment. One the issues raised was that the racial discrimination claim should be stricken because it does not relates back.

A second ground in that motion was that there wasn't any evidence in the record to date to raise a genuine issue about racial discrimination.

Your Honor, on May 8 of this year, after directing us to file by fax in chambers a Response to the Motion, denied this Motion. Therefore, Your Honor, approximately ten days ago, has ruled and rejected the argument that Counsel just made about relation back. And, again, the Court addressed

this argument, and the argument that there wasn't racial discrimination, to raise a genuine issue about it.

And the Court might remember that there was a witness who was also a teller at the time that the teller made a mistake by not punching a hole in the check. And this witness said in a deposition, when questioned by Counsel, that this teller she heard [M-39] use the expression "Black bitch" to refer to customers in the bank. And this witness also said in the deposition that she heard the teller, who didn't punch this hole, blurt out one day, "I forgot to punch the hole in the bitch's check."

So there was evidence that we presented in responding to the Motion for Summary Judgment.

And Your Honor necessarily held, although there is not a written opinion, that you rejected the argument that the Complaint could not relate back on a racial discrimination, and that there wasn't any evidence to support that now.

The second issue that Counsel raised in this Motion to Strike the Amended Complaint was to — that Plaintiff had waived the request for jury trial.

Now, Judge Smith, in a hearing which I read, I believe it was January 10, did rule that the request for a jury trial had been waived.

On March 10 Plaintiff filed a Motion asking for reconsideration of that Rule. And that motion made two points.

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The first point is that Plaintiff filed, along with the original Complaint, the Civil Non-Domestic Case Information Report. And near the very top, where it said "jury demand" the Plaintiff [M-40] checked "yes." And this Request for Reconsideration that was filed on March 10 pointed out not only Maryland cases, but various federal cases that had held that a similar kind of request for a jury trial and some kind of collateral documentation, was adequate to raise the request for a jury trial.

The response also cited to a Maryland case that held that an Amendment to the Complaint is allowed, and the Amendment allowed that if there is a claim that is triable by a jury, that all the claims can then be tried by a jury.

And that is cited in that March 10 memo. And there has not been a ruling on that Request for Reconsideration.

So that was the second issue that Counsel raised in moving to strike the (Second) Amended Complaint.

The third issue that Counsel raised was that the Amended Complaint that was filed in December of 2000 asked for punitive damages. And counsel said that punitive damages has not been requested in the two claims that remain from the original Complaint. It is correct that three claims from the original Complaint were stricken after a Motion to Produce.

Now, in the original Complaint there was [M-41] first stated one claim that asked for punitive damages. And then

at the beginning of the wrongful dishonor claim it said that, as sometimes happens, it said that Paragraphs 1 through 31 are repeated.

Now, if you go back to what was incorporated there, there was an allegation that the teller, and what was repeated from the first part: There was an allegation that the teller who didn't punch of the hole had personal animosity towards the Plaintiff. There was an allegation that the bank knew for a number of days after the hole wasn't punched about that problem, but didn't act to correct the situation for approximately two weeks.

And there was also an allegation that after Plaintiff came back from a vacation she came to the bank because she received phone calls saying, your checks are bouncing.

She went to the bank to try to find the problem. And, of course, we had alleged that the bank knew of the problem, but she was ushered into a room where she worked five or six hours before being told just before she had to leave the bank, well, the problem is because a hole wasn't punched.

So there was in the original Complaint, by incorporating the allegations in the first part, facts [M-42] from which you could find the state of mind that the Maryland Court of Appeals requires for punitive damages: Namely, you can't get punitive damages based on some concept of recklessness, but there has to be actual knowledge of wrongdoing.

Here there was an allegation of personal animosity of the person that didn't punch the hole. That the bank knew of

the problem for a couple of weeks, but didn't act to correct it. And that a person allows Plaintiff to suffer in this room for five or six hours, although the bank knew the problem.

Now, it is correct that in the Prayer for Relief in the wrongful dishonor part of the Complaint it just asks for $200,000 in gross for damages. It does not say whether that was compensatory or punitive damages. And, in my understanding, that would not be an adequate request under current Maryland law to ask for punitive damages.

Now, Counsel is basically saying that when someone files an Amended complaint, and adds an element of relief, which is what punitive damages is, that is appropriate in many types of claims if there is the requisite knowledge. That is such a departure from the original Complaint that somehow that allegation can be stricken.

[M-43] That simply isn't correct. And if one looks at the Rule in Maryland on Amendments 2-341(a), all that it says is:

Prior to fifteen days of trial date. If an amendment introduces new facts or varies the case in a material respect, an adverse party who wishes to contest new facts or allegations shall file a new or additional answer to the amendment within the time remaining to answer the original pleading.

If filing a new form of relief is varying the case in a material effect, all it says is the Defendant should file a new Answer.

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Then, down in part C, going to Amendment, it says: An amendment may seek to (1) change the nature of the action or defense, (2), set forth a better statement of facts concerning any matter already raised in a pleading, (3) set forth transactions or events that have occurred since the filing of the pleading sought to be amended.

Well, if just adding an element of relief is changing it in the midst of the action, that contemplates that kind of change.

So these are the three specific areas in which Counsel tried to base the Motion to Strike the Amended Complaint. One of them, as we point out, Your [M-44] Honor, was just ruled on ten days ago and rejected the contentions he just made.

I also want to point out that after the Amended Complaint was filed in the beginning of December of the year 2000, it was at the beginning of 2001 when the depositions in this case were taken.

In other words, the depositions, they began approximately a month, and then were — it is in the next month or so after the time of the Amended Complaint.

Counsel had the opportunity at that time to deal with the facts that we are relying upon in our claims of punitive damages, with the exception of the difference between the bank's written standards that address how overdrafts, or possible overdrafts, are handled, and then how the accounts are addressed. And the differences are between retail accounts and a commercial account, like the Plaintiff has.

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And here is a simple example.

If someone had an account that had $5,000 in it, and it is a retail account, and one check comes in for $2,000 — I am sorry, $10,000,000 — which is above that $5,000, and a second check comes in for $3,000, the rules for retail accounts say you send back — in other words you do not honor — the check [M-45] for $10,000, but you pay the check for $3,000. The Rules — And both sets of Rules were adopted in 1994.

The rules for commercial accounts didn't have that common sense principal. And it is also one which we say is found in Section 4-402 of the UCC, which is the section about wrongful dishonor. That principal was not in the rules about commercial accounts.

And the people at the bank who, on this day when these thirty-one checks came in, considered what to do under the rules for commercial accounts, they could return all the checks, even though thirty of them could have been paid if one was returned. So, —

And this is in the bank's own rules from 1994. So it is hard to see how the bank is prejudiced from our relying on that.

So, basically, there isn't any merit in the contentions in the Complaint, and the contentions in the Amended Complaint should be stricken.

MR. TRACY: Your Honor, if I may, once again, —

THE COURT: Just one second. We will break.

Mr. Sheriff, when we complete argument we [M-46] will bring Mr. Cromer in, because we do have a verdict.

MR. TRACY: Your Honor, presentation by Plaintiff's Counsel, focusing on the manual provisions, has already indicated the manual developed by the UCC imposes something by law back in 1995. It moves back to relevance, move back et cetera, et cetera.

The whole argument is relevant because the Plaintiff is now attempting to confuse the (Second) Amended Complaint with the First Amended Complaint.

The First Amended Complaint adds one cause of action only. That is the racial discrimination court only. It doesn't impose UCC systems logic and the logic of what gets returned or paid.

We have already admitted liability to all checks. It is a non-issue. But that Amended Complaint solely adds a cause of action.

Now, 2-341 states, specifically, that if different operative facts are plead the Complaint should be stricken. 2-341 says the Complaint should be stricken, the cause of action itself, one new cause of action. There is no dispute, and there can be no dispute, that this claim is barred by the Statue of Limitations.

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[M-47] I have been through the facts as we have developed the facts. There is no reference to this claim. It is five years after it has been incurred as viable.

That course of action cannot come to trial under the Statue of Limitations, and the Plaintiff did not file it within the Statue of Limitations.

That was the only substantive change in the allegation in the Complaint to be made.

Now, on the issue of damages, the Plaintiff seems comfortable that the initial Complaint, even though three of the five accounts were dismissed, they still have pending claims. I disagree. But that is a question of interpreting the facts.

The Defendant will defend itself in that Complaint under 4-222. The Defendant will defend itself under the Complaint.

And the Defendant, five years after the event, only makes one substantial claim, adding racial discrimination. All of this is outlined in the Motion to Strike. And the supplement demonstrates that in no way can that cause of action come back.

The Plaintiff's reference to the manual and to the Rules and to the UCC provisions, liability [M-48] under which has been admitted on numerous occasions, is irrelevant.

The suggestion that Your Honor has already ruled on this I think is also disingenuous. This Motion was filed in

September. Technically, it is a Motion to Strike the Plaintiff's Motion, which was heard before the Motion for Summary Judgment.

Motions for Summary Judgment were filed just a couple of weeks before trial because of the way this case has proceeded, denied without hearing, without a written opinion. There is no reason why Your Honor denied that motion without having the Defendant address the issues of relation back. The issues of relation back are clear issues here.

As far as evidence of what the Plaintiff's Counsel has suggested, there was deposition testimony from one teller who had heard the words "black bitch."

It was not addressed to the Plaintiff. The teller herself said we got along. She is in the arrases. And she has muttered things under her breath about other customers who have caused her aggravation.

It is a normal reaction. And it may not be appropriate, but she is human. And that she said something that is inappropriate doesn't mean that the Plaintiff, especially when it is not directed to the [M-49] Plaintiff, is not a prima facie case.

But, regardless of one statement, that is it. And that is a statement that the Plaintiff didn't even elicit. I elicited it.

I made sure I got every fact from the Plaintiff. And she told me everything she knew, and everything she possibly could have heard. And that is it. But that is all irrelevant.

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If the Plaintiff was a victim of racial discrimination all she had to do was bring that.

Even if the failure to aver was absolutely inadvertent, this was not inadvertent. It was never suggested that this was an allegation in the two years after filing, after her deposition, after Answers to Interrogatories. And now she is making the claim, Your Honor.

That is not how it is to be applied. The Defendant should not be forced to defend against claims that they have not had an opportunity to investigate under pretrial procedure. And it is absolutely barred by the Statute of Limitations.

In reference to this other motion. It is the ruling on this case for the Motion for Summary Judgment.

Also, in response to cases that may appear [M-50] upon examination close, the result is to let it go to trial.

You can never be reversed if you go ahead and let the case go to trial. You can be reversed on Summary Judgment, but the trial judge has a better instinct in close instances to let the matter go to trial.

And the denial of the Motion for Summary Judgment is a denial of a Motion for Partial Summary Judgment, particularly where there is simply an order signed saying that the action does not inform as much as one might want it to inform.

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The Motion to Strike, it is — before it got considered — by the fact that we had the case on that Motion for Partial Summary Judgment. And we were told to consider the Motion to Strike, even though it was not our chambers assignment responsibility.

THE COURT: The Court finds that there is no allegation in the Complaint, the original Complaint, that can be construed as giving notice to the Defendant of any claim related to the provision of Section 1981, and they do not relate back.

So the Motion to Strike the Amended Complaint is granted.

MR. TRACY: Thank you, Your Honor.

APPENDIX E — STATUTES INVOLVED

18 U.S.C.A. §§ 1344(1) & (2)

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice —

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C.A. § 656

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, or a receiver of a national bank, insured bank, branch, agency, or

organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank, branch, agency, or organization or holding company or any moneys, funds, assets or securities intrusted to the custody or care of such bank, branch, agency, or organization, or holding company or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3 of the Federal Deposit Insurance Act.

Appendix E

18 U.S.C.A. § 1005

§ 1005. Bank entries, reports and transactions

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act,[1] without authority from the directors of such bank, branch, agency, or organization or company, issues or puts in circulation any notes of such bank, branch, agency, or organization or company; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank, company, branch, agency, or organization with intent to injure or defraud such bank, company, branch, agency, or organization, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, company, branch, agency, or organization, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any

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1. So in original.

agent or examiner appointed to examine the affairs of such bank, company, branch, agency, or organization, or the Board of Governors of the Federal Reserve System;[2]

Whoever with intent to defraud the United States or any agency thereof, or any financial institution referred to in this section, participates or shares in or receives (directly or indirectly) any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such financial institution—

Shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3(w)(1) of the Federal Deposit Insurance Act.

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2. So in original. Probably should be followed by "or".